facts had already, at that stage, been proved which brought the case within any one of the exceptions. Had he done this he would, in my opinion, have been bound to consider whether or not the eighth exception applied to the case. That exception reads as follows :—

> It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.
>
> *Illustration.*
>
> If A. in good faith accuses Z. before a Magistrate; if A. in good faith complains of the conduct of Z., a servant, to Z's master; if A. in good faith complains of the conduct of Z., a child, to Z's father — A. is within this exception."

It was quite clear from the prosecution evidence that the appellant had complained of the conduct of a servant of the manager to his master, the manager. Therefore, if the complaint was made in good faith then all the facts necessary to bring the appellant within the exception would have been made out. The final paragraph of section 499 reads as follows :—

> In proving the existence of circumstances as a defence under the 2nd, 3rd, 5th, 6th, 7th, 8th, 9th or 10th exception, good faith shall be presumed unless the contrary appear.

The question, therefore, that had to be decided at the close of the case for the prosecution was whether or not the complaint had been made in good faith or whether the contrary appeared.

I can see nothing in the grounds of decision of the learned President to suggest that at the close of the case for the prosecution he really considered the question whether or not the evidence before him was sufficient to rebut the presumption of good faith and I am of opinion that he ought to have done this before calling upon the appellant for his defence. For this reason, I was of opinion that the conviction could not stand.

It was urged upon me, on behalf of the Public Prosecutor, that there was some evidence of lack of good faith in that the four labourers from whom the appellant told the complainant that he received the information subsequently denied to the manager having said anything of the kind. The evidence on this point given by the complainant and by the manager would certainly have been admissible had the four labourers concerned been called as witnesses; in that event the appellant would have had the opportunity of cross-examining them. As, however, the labourers were not called, I am inclined to think (although this point has not been argued before me) that the evidence as to their denial was inadmissible (*Rex v. Christie*[1]). There is no evidence on the record as to the behaviour of the appellant when these alleged denials were made so as to suggest that by silence or other means he accepted these statements as his own. Moreover, when the labourers were brought before the manager they were under no legal obligation to speak the truth and the reluctance of labourers in this country to do or say anything which might involve them in any kind of dispute is common knowledge. Where, as in this case, the alleged denial is deposed to by other witnesses and the appellant has no opportunity to cross-examine the labourers themselves as to this denial it would, in my view, be unfair to the appellant to look upon this as any evidence of lack of good faith. Indeed, the failure of the complainant to call these labourers suggests that their evidence, if given, would not have been favourable to the prosecution.

I did not feel, therefore, that this was a case in which it would be proper to order a re-trial and I, therefore, quashed the conviction and sentence.

*Appeal allowed.*

---

## LIM KHOON AIK v. PUBLIC PROSECUTOR

**[A. Cr. J. (Thomson J.) May 17, 1949]**

**[Ipoh — Criminal Appeal No. 15 of 1949]**

*Penal Code ss. 408 and 477A — Joinder of charges of criminal breach of trust and falsification of accounts — Criminal Procedure Code (Cap. 6), s. 165.*

The appellant in this case was tried before the District Court at Ipoh on a charge of criminal breach of trust under s. 408 and two charges of falsification of accounts under s. 477A of the Penal Code. These charges were tried together with a similar charge of criminal breach of trust against one E. A. Nunn. In the course of the proceedings the first charge against the appellant was amended by the insertion of the words "jointly with E. A. Nunn, the manager of the said Messrs. Whiteaway, Laidlaw & Co. Ltd." In the event he was convicted on the first charge as originally framed and on the other two charges. No application was made for a separate trial.

**Held:** where there is one charge of embezzlement and that embezzlement refers to two charges of falsification of accounts then those offences are so connected as to form part of the same transaction within the scope of s. 165 of the Criminal Procedure Code (Cap. 6).

*Cases referred to :—*

(1) *King-Emperor v. Attursing* A.I.R. 1932 Sind 65.

(2) *Emperor v. Manant K. Mehta* I.L.R. 49 Bom. 895.

MAGISTRATE'S CRIMINAL APPEAL.

*T. E. Conaghan* for the appellant.

*Cur. Adv. Vult.*

**Thomson J.** : — This appellant was tried before the District Court at Ipoh on a charge of criminal breach of trust in contravention of section 408 of the Penal Code and two charges of falsification of accounts in contravention of section 477A. These charges were tried together with a similar charge of criminal breach of trust against one Nunn. In the course of the proceedings the first charge against the appellant was amended by the insertion of the words "jointly with E. A. Nunn, the manager of the said Messrs. Whiteaway, Laidlaw & Co., Ltd.". In the event he was convicted on the first charge as originally framed and on the other two charges, and sentenced on the first charge to eighteen months rigorous imprisonment and a fine of $1,000 or in default of payment a further twelve months rigorous imprisonment, on the second charge to three months rigorous imprisonment to run consecutively to the sentence in the first charge, and on the third charge to three months rigorous imprisonment to run concurrently with the sentence in the second charge.

On a consideration of the record there is no room for any doubt whatsoever as to what the charges were upon which the appellant was convicted.

Against these convictions and sentences he now appeals.

Certain of the original grounds of appeal have been abandoned, and I do not think I am doing any injustice when I say that the convictions are appealed against on four main grounds :—

1. That the joinder of the two charges of falsification of accounts with the charge of criminal breach of trust was bad in law;
2. That the accused should not have been tried jointly as he was with Nunn;
3. That there was no evidence to support the convictions for falsification of accounts; and,
4. That the Grounds of Judgment as provided by the learned District Judge shew that he did not pay sufficient attention to certain matters which were in favour of the accused and that had he paid attention to these matters he would not have found accused's explanation unreasonable or in any way unacceptable.

With regard to the first of these grounds, it can be most conveniently considered by saying, in the first place, that the prosecution argued that the case was covered by section 165 of the Criminal Procedure Code, the material part of which reads as follows :—

"If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence".

For the appellant, however, it was contended that this section (which corresponds to section 235 of the Indian Criminal Procedure Code) did not apply and in that connection my attention was invited to the Indian case of *King-Emperor v. Attursing*[1] in which it was said by Rupchand A.J.C. :—

"The offences of embezzlement (that is, of course, criminal breach of trust) and falsification of accounts are not offences of the same kind within the meaning of s. 234, Criminal P.C., nor are three different acts of embezzlement and falsification of accounts committed at different times so connected as to form part of the same transaction within the meaning of s. 235 of that Code".

Section 235 of the Indian Code is, as I have said, identical with section 165 of the local Criminal Procedure Code. The meaning of that passage which might otherwise be in doubt, becomes abundantly clear when reference is made to the earlier Indian case (which was mentioned with approval in *Attursing's*[1] *case*) of *Emperor v. Manant K. Mehta*[2] where it was said by Coyajee J. :—

"The contention, then, is that the charge alleges more than three distinct offences; it is not covered by s. 234 of the Code, inasmuch as the offences of criminal breach of trust and of falsification of accounts are not offences of the same kind; and it cannot fall under s. 235, because there are three falsifications committed on different occasions, and the false entries connected with one defalcation cannot be said to form part of the same transaction with the other defalcations and falsifications"

The position, however, in the present case is entirely different. Here there is only one charge of embezzlement and there is not the slightest room for doubt that it is to that embezzlement that the two charges of falsification of accounts refer.

Nor I think can it be argued in general terms that the offences were not so connected as to form parts of the same transaction. I appreciate, of course, the force of the argument that the embezzlement, if it did take place, took place (I speak notionally of course) somewhere between Messrs. Whiteaway's premises and the Bank and that the falsification of accounts related to portions of the accounts which would go to shew the profits and losses the firm was making. It is clear, however, from the evidence that these particular falsifications which were alleged would have the effect, if undetected, of making out the firm's profits to be greater or its losses to be lesser than they actually were, and it seems to me impossible to say that this would not have the effect of making any misappropriation of the firm's money more difficult to detect. If a housebreaker puts up a notice "beware of the dog" at the entrance to the premises in which he is about to effect his purpose, that is as much part of the transaction of which the carrying out of his purpose is a part as is his wearing a mask and gloves.

As regards the contention that the accused should not have been tried at the same trial as Nunn, these two parties were charged in effect with the same offence, and the accused was charged alone with two other offences which I have already held to be part of the same transaction. The Court had a discretion to try the two parties together or to order them to be tried separately. No application was made to have them tried separately although both were separately represented by counsel of great experience. In the circumstances, I do not think it can possibly be argued that it was the wrong exercise of his discretion that was made by the learned District Judge when he decided to go on with the joint trial. He had no knowledge what the defences were going to be and in the absence of any intimation to that effect, still more, in the absence of any application by either of the counsels engaged in the case, I do not see what other course he could have adopted. Had an application for separate trial been made and rejected the point might have been raised here with more hope of success. No such application was made, and I am not prepared to say that the raising of the point here has any merit. On the evidence, I am satisfied that the appellant was in no way prejudiced by being tried jointly and so I have so much the less compunction in saying to him, "You agreed to a joint trial, you cannot be heard now to complain about it because it has gone against you".

As regards the third and fourth grounds of appeal, I propose to deal with these together, and briefly. I have perused the evidence with care and I have considered the Grounds of Judgment as recorded by the learned District Judge on 14th February, that is more than three weeks after he had convicted the accused and discharged Nunn. I do not propose to deal with the Grounds of Judgment beyond observing that in no instance do they shew that the learned District Judge was in any way influenced by anything that should have been excluded from a consideration of the case. On the question of the handwriting of the entries on which the falsification of accounts charges to some extent depended, there was evidence that the handwriting of the ledger as a whole was that of accused, there were other admitted instances of the appellant's handwriting before him, and I see no reason why if he observed a similarity between the falsified portions of the ledger and the other portions he should not give full weight to that observation.

To return to the evidence, as a whole I do not see how it was open to the learned District Judge to come to any other conclusion that as far as this appellant is concerned, he was guilty on all charges. I say nothing with regard to his findings in relation to Nunn. I am not here concerned with Nunn. All I am concerned with is the conviction of this appellant, and I have no doubt whatsoever that it was fully justified. There is no question that a large amount of Whiteaway's money was missing, it was clear that not only had the ledger been falsified but the false entries had been made by the appellant. There was his admission of guilt to Barnett, which I should observe in justice to Barnett, he himself admitted making, and there was the money payment which was admitted by him. Above all, there was what I can only describe as the massive body of evidence which showed that time after time when there was a short payment of a round sum to Messrs. Whiteaway's banking account there was a corresponding payment of a similar round sum into what was in effect the accused's bank account. It may be that the appellant was a tool of Nunn, it may be that Nunn was an innocent victim of the appellant. In either event there can be no question of appellant's guilt and I have no option but to dismiss the appeal against the conviction.

As regards the sentences, I am aware that no previous criminal offence is alleged against the appellant. On the other hand I cannot but observe that a very large sum of money was concerned and that it was misappropriated in a long and deliberate course of fraud. It is not a case of a young man falling into sudden temptation, it is not a case of a young man finding the till unlocked and on the spur of the moment helping himself out of difficulties. It is a case of a long continued deliberate course of fraud, and I am bound to take the view that the learned District Judge was entitled to take a serious view of the matter.

I said a moment ago it was immaterial as far as the guilt was concerned whether it was the accused who was the tool of Nunn or whether it was Nunn who was the victim of the appellant.

Returning to that point in relation to sentences, however, I am bound to say that although different circumstances have arisen as regards the bringing home of guilt between the two, I find it impossible to regard either of them as anything but a rogue and a dishonest and unfaithful servant, and the fact that Nunn was a rogue and a dishonest servant was no excuse for the appellant.

However, the District Judge had the benefit of a much closer acquaintance with the evidence than I have had and if he could find grounds for leniency I am not prepared to interfere. The appeal against sentences is dismissed.

*Appeal dismissed.*